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## The Single European Sky; what about the liability aspect?

Delphine Defossez<sup>1</sup>

### Abstract:

Following the liberation of European air transport in the 90s, the Union has tried to implement dramatic changes by enacting the Single European Sky Regulations (SES). The cornerstone idea of the SES Regulations is to create so-called functional airspace blocks or FABs. These FABs will normally satisfy the growing capacity requirements of all airspace users and minimise delays by managing air traffic more dynamically. This will have as immediate consequences an increase in efficiency.

This article will examine each of the Treaties establishing the FABs in detail with regard to the liability aspect only and, while acknowledging their advantages, it will point out the differences in the protection they offer and the consequences the author sees happening. This article will also suggest several improvements. The primary focus of the article is the liability aspect in the FAB Treaties, but references to agreements between ANSPs will also be included.

Through showing the advantages of the proposal, this article highlights the hypothesis that the Single European Sky will not bring any changes to the current liability framework; to the contrary, it will further blur the general picture by adding a layer of fragmentation.

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The Single European Sky; what about the liability aspect?

The Union mistakenly thought that by letting the Member States deal with liability issues in the inter-state agreements establishing the Functional Airspace Blocks (FABs), the situation in Europe will improve. The question of liability had been foreseen and discussed by the Commission before the first package of Regulations was adopted in 2004, however, the Commission preferred to let Member States regulate this matter. Instead of dealing with the problem at EU level, it was believed that the settlement of disputes is best left to the national level. Therefore, the States will be able to apply international and national legal instruments that could best fit the case. This might be one of the most serious mistakes the Commission made concerning the Single European Sky proposal, certainly when the Regulations are largely silent on the content of the agreements with regard to liability issues.

Why is allocation of liability such a crucial problem? The system foreseen in the SES will lead to a shift from nationally based air traffic management to ‘supra-national’ management, however no new solutions are provided. The way the proposal is framed will blur the original picture, as now there are three types of laws that will be applicable to a case; international, EU law and inter-state agreements and finally national law. The main issue is the absence of solutions provided at EU level. Normally, the more clearly defined the tasks are, the easier it is to establish liability. This is, basically, where the SES Regulations, and in general the law regarding space law, fails to be clear and concise. Instead, the relationships between the various actors are intricate and the distinctions between their tasks are blurry. It might seem surprising that in a system that involves a high degree of risk and which will encompass 28 different national regimes, the answer to the question of who is primarily liable is nowhere to be found in the SES Regulations.

The questions of liability were examined during the legislative process and in the development of the FABs. But before 2004, most Member States, through state-owned administrations or corporatisation, were providing air navigation service over their own airspace. As a result, they were also fully liable for any incident, according to national law systems. For that simple reason, dealing with liability problems was not a major issue nor necessary. Therefore, the settlement of disputes was left to the national level, which can apply national or international law.

The cornerstone idea of the SES is the establishment of nine Functional Airspace Blocks (FABs)<sup>2</sup>, as required by Article 5 of the SES Airspace Regulation (No 551/2004) and Article 9a of Regulation 1070/2009. Even with the consolidated version, the only definition of a FAB is in the recital 25 of the SES Framework Regulation (No 549/2004), which defines it as an ‘airspace block based on operational requirements, reflecting the need to ensure more integrated management of the airspace regardless of existing boundaries’. FABs are considered as being able to become the driving force for performance and will bring changes to the landscape of Air Traffic Management Service provisions<sup>3</sup>. Additionally, the FABs are regarded as the best solution in order to achieve the highest level of integration possible<sup>4</sup>. However, their creation has not been without obstacles, both economical and political<sup>5</sup>. FABs have to be based on legal agreements between the different States of the same FAB, as could be deduced from paragraphs 3 and 7 of Article 9a Regulation 1070/2009.

On paper, all this sounds wonderful. In reality, however, the comparison of the treaties establishing the FABs reveals more divergences than similarities. Instead of harmonizing and bringing the Member States closer, we found ourselves in the situation where the solution varies depending on the FAB. In the context of a broader study, I tried to assess whether any changes will occur with regard to liability with the implementation of the SES. To my surprise, it was nearly impossible to compare the FABs on this ground.

If one tries a quick search in the Regulation 1070/2009 for liability, he won’t have any result. This is not really surprising. The only reference to liability in the package of Regulations is in

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<sup>2</sup> Kenneth Button & Rui Neiva, *Single European Sky and the functional airspace blocks: Will they improve economic efficiency?* 33 JATM 73, 74 (2013)

<sup>3</sup>Eurocontrol, *Evaluation of Functional Airspace Block (FAB) initiatives and their contribution to performance Improvement* (Performance Review Commission) FAB Evaluation (2008)

[http://ec.europa.eu/transport/modes/air/studies/doc/traffic\\_management/evaluation\\_of\\_fabs\\_final\\_report.pdf](http://ec.europa.eu/transport/modes/air/studies/doc/traffic_management/evaluation_of_fabs_final_report.pdf)

(accessed 3 July 2014); Kenneth Button & Rui Neiva, *Single European Sky and the functional airspace blocks: Will they improve economic efficiency?* 33 JATM 73, 74 (2013); Belgocontrol, *The Functional Airspace Blocks in the Single European Sky*, p.2,

[http://www.belgocontrol.be/belgoweb/publishing.nsf/AttachmentsByTitle/Background\\_on\\_FABs.pdf/\\$FILE/Background\\_on\\_FABs.pdf](http://www.belgocontrol.be/belgoweb/publishing.nsf/AttachmentsByTitle/Background_on_FABs.pdf/$FILE/Background_on_FABs.pdf) (accessed 29 June 2014); European Commission Mobility and Transport, *Functional Airspace Blocks (FABs)*, [http://ec.europa.eu/transport/modes/air/single\\_european\\_sky/fab/](http://ec.europa.eu/transport/modes/air/single_european_sky/fab/) (accessed 9 June 2014)

<sup>4</sup> Kenneth Button & Rui Neiva, *Single European Sky and the functional airspace blocks: Will they improve economic efficiency?* 33 JATM 73, 75 (2013)

<sup>5</sup> Air Traffic Control is falling under the heading of State sovereignty and some Member States used State sovereignty as an excuse to block cross-border integration. See: Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Single European Sky II: towards more sustainable and better performing aviation*, 3, COM (2008) 389/2

the requirement for ANSPs to be insured for the risks that may arise from their activities<sup>6</sup>. Liability is enumerated among the other common requirements set in Article 6 of the Service Provision Regulation (No 550/2004).

The reasons of this lenient approach are multiple. One reason could be that the Union knew that if it imposed strict rules on Member States, the proposal would never pass. The need for solutions to the fragmentation of the European airspace is certainly not to be denied. A second reason is that liability is an extremely complex issue, certainly when there is no harmonization of tort law at European level. The Union would have faced enormous problems in achieving minimum harmonization for airspace liability matters. Probably, if the Union had decided to impose liability rules, the discussion would still be going on now. Surprisingly enough, the Union proposes a shift from national systems to a supranational system, with national barriers being eliminated and closer cooperation required but at the same time letting the States decide how the liability question should be dealt with in practice by applying international convention or national law. But as the proposal stands, this is the reality. However, there are intermediate approaches which would have partially solved the problem without creating too much inconvenience both the Member States and the Union.

In this article, the demonstration of this lack of consistency among Member States will be given by firstly looking into details at each agreement separately and then by trying to compare them.

#### 1. State liability within the Treaties establishing the FABs.

In every FAB agreements, one of the first articles is concerned with sovereignty. Every version of this article always includes a statement to the effect that the agreement is ‘without prejudice to the sovereignty of the Contracting States over their airspace or their rights and obligations under the Chicago Convention and other instruments of international law’<sup>7</sup>. Member States have protected themselves against inconsistencies between the provision of EU law and International Conventions; International law still prevails. The duty of the Signatory States to provide ANS, encompassed in Article 28 of the Chicago Convention, is maintained. Most national laws derive an obligation, inspired by their duties under Article 28, to compensate the

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<sup>6</sup> Francis Schubert, *The Liability of Air Navigation Services Providers: Some Lessons from the Single European Sky*, in *Achieving the single European sky: goals and challenges*, 56, (in Daniel Calleja Crespo and Pablo Mendes de Leon (eds), 51-64, Kluwer Law International, 2011)

<sup>7</sup> Article 3 of the NEFAB Agreement. Similar wording in Article 5 of the Baltic FAB.

The sovereignty principle in Article 1 of the Chicago Convention is not affected by the arrangement between Contracting States.

victims when an accident occurs on its territory (hereafter referred to as the liable State or State of occurrence). With the new framework introduced via the SES, the place of occurrence theory might have reverse consequences, particularly when the inter-state agreements do not provide a clear framework of liability within the FAB.

Normally, the relevant states' arrangements establishing the FAB need to provide also for the liability framework. This framework is essential if the FAB is to be effective and run smoothly<sup>8</sup>. Indeed, when liability provisions are clear and precise, they bring legal certainty and might attract companies. Furthermore, the Contracting States can lay down conditions for reimbursement from the ANSP and how to use their right of recourse<sup>9</sup>. Needless to say, that the taxpayers of the State of occurrence will bear the final responsibility, as that State is always ultimately liable. The agreements should provide answers and the possibility of recourse in order to protect taxpayers from bearing the financial burden of the accident. Unfortunately, as we will see in the following section, not every FAB agreement has specific provisions addressing liability issues.

#### a. FABEC

The FABEC includes Belgium, France, Germany, Luxembourg, The Netherlands and Switzerland. It will be one of the biggest blocks: accountable for 55% of the European traffic and encompass most of the major European airports<sup>10</sup>. It is essential to analyse liability provisions and the limitations to them as, due to its size, the number of actors who can be involved in the accident is more important than in other FABs. Consequently, the liability provisions should be clear and precise.

Chapter 11 of the Treaty establishing the FABEC addresses liability issues when a cross-border element is involved. According to the first sentence of Article 30.1, the State of occurrence will be primarily responsible<sup>11</sup>. The wording of the second paragraph is crystal clear: 'No direct action may be brought against the effective air traffic service provider or its agents or any other person acting on its behalf'. Therefore, the primary claim will be against the State who may

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<sup>8</sup> Francis Schubert, *Legal Aspects of Cross-Border Service Provision in the Single European Sky* 35 Air & Space law 113, 122 (2010); European Commission Mobility and Transport, *Functional Airspace Blocks (FABs)*, [http://ec.europa.eu/transport/modes/air/single\\_european\\_sky/fab/](http://ec.europa.eu/transport/modes/air/single_european_sky/fab/) (accessed 9 June 2014)

<sup>9</sup> Ibid, p.122

<sup>10</sup> Eurocontrol, *About FABEC* <http://www.eurocontrol.int/articles/about-fabec> (accessed 29 June 2014)

<sup>11</sup> Agreement relating to the establishment of the Functional Airspace Block Europe Central between the Federal Republic of Germany, the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of The Netherlands and the Swiss Confederation, version 2.0 (18 May 2010)

then claim compensation from the wrongdoer depending on the arrangement that links the (two) parties. The concept of reimbursement is embodied in Article 30.6, Member States can seek reimbursement from the ANSP if the accident was caused by its negligence, or reimbursement from '[...] any other person or operational entity', Article 30.9. Additionally, the State of occurrence and the State of the ANSP can agree on sharing the costs, Article 30.8.

A different approach was taken in the agreement conferring powers to the Maastricht Upper Area Control Center (MUAC), which covers a part of Germany and the Benelux countries. Eurocontrol, in charge of the MUAC, is partially liable for anything that happens over the MUAC area, as provided in the amended version of 1981 which amended the 1960 Convention signed in Brussels<sup>12</sup>. The confusion lies in that: whereas in the FABEC Treaty the answer is clear: the State is primary liable and then it can seek reimbursement by the ANSP, in the agreement establishing the MUAC, Eurocontrol is the primary actor to bear responsibility and it can then seek compensation from the negligent State. Additionally, Article 30(2) of the FABEC Treaty, clearly stipulates: 'no direct action can be taken against the effective air traffic service provider or its agents or any other person acting on its behalf', whereas Article 28.2 of the Convention stipulates that Eurocontrol is liable for damage resulting from its negligence and not subject to state immunity<sup>13</sup>. As a result, if an accident occurs over the MUAC area, establishing who will be firstly liable will not be an easy task, as the two pieces of legislation clearly contradicting each other. A dual responsibility for the same area is provided: the State of occurrence and Eurocontrol. Additionally, Article 30 (13) of the Treaty only mentions '[...] bilateral agreements between two Contracting States', which does not apply to the agreement establishing Eurocontrol, will be superseded by the FAB Treaty.

This is not the only contradiction. The Convention that delegates power to Eurocontrol contains other incompatible provisions.

For instance, under the Belgian version of the agreement which confers power to Eurocontrol, Article 1(2) clearly states that the delegation does not extinguish the rights and duties of Belgian State under international agreements<sup>14</sup>. But, Article 11 paragraph 1 states that each party is

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<sup>12</sup> Alias, *E.02.13-ALIAS-D1.3-Framing the Problem - Final Version*, 64, (Version 00.00.01) E.02.13 (2013)

<sup>13</sup> Previously Article 25.2

<sup>14</sup> 'Article 1.

1. [...]

2. Chacune des Parties contractantes nationales, tant pour l'espace situé au-dessus de son territoire que pour les parties de l'espace aérien au-dessus des étendues maritimes [...], conserve ses compétences et obligations en matière de législation aéronautique, de réglementations, d'organisation de l'espace aérien et de relations avec des

liable for the damage imputable to it, whereas the second paragraph states that except for the cases falling under paragraph 1, Eurocontrol has to guarantee the contracting parties against an action which might be brought in case of damages. Here again, the picture is blurry; on the one hand, Eurocontrol will have to pay for damages, but on the other hand, the agreement does not extinguish the duties of the Contracting States under international law. Furthermore, it can only be assumed, by looking into the internal regulation of Eurocontrol, that Belgium will be the applicable law and forum. The Convention neither stipulates the applicable law nor the proper forum<sup>15</sup>. Nevertheless, Eurocontrol has a right of recourse against the State if the damages are also due to the negligence of that State, as specified in Article 28.2 of the Convention and Article 11(3) of the Belgian agreement<sup>16</sup>. The answer, until Article 30 of the FABEC Treaty was adopted, was simple: Eurocontrol was liable for the whole amount of damages and had recourse against the State(s) for the part of the damages which was not due to Eurocontrol's negligence. The only problem then would be determining the applicable law and jurisdiction. However, with Article 30 of the FABEC Treaty it is impossible to know who is primarily liable.

Another limitation of the Treaty is geographical; indeed, the Treaty applies only to cases occurring within the FABEC and having a cross-border dimension<sup>17</sup>. For instance, if the ANSP that provide service over the State is a national one, even if it has delegated some of its power to a foreign ANSP, the case will be considered as domestic and therefore, the Treaty will not

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Organisations internationales comme l'OACI, ainsi qu'avec les usagers de l'espace aérien ou toute autre tierce partie.'

See : Accord relatif à la fourniture et à l'exploitation d'installations et des services de la circulation aérienne par EUROCONTROL au centre de contrôle régional de Maastricht, signé à Bruxelles le 25 novembre 1986. Affaires Etrangères, Commerce extérieur et coopération au développement. (Publication n° 14-03-1990, 4706, Dossier numéro : 1986-11-25/31, Entrée en vigueur : 01-01-1990.)

<sup>15</sup> Alias, *E.02.13-ALIAS-DI.3-Framing the Problem - Final Version*, 64, (Version 00.00.01) E.02.13 (2013)

<sup>16</sup> 'Article 11.

1. Chaque Partie contractante nationale est responsable de tout dommage survenu par suite ou à l'occasion des services qu'elle fournit à l'Organisation conformément aux dispositions de l'Article 2, paragraphes 2 et 3 du présent Accord dans la mesure où ce dommage lui est imputable.

2. Sauf dans le cas prévu au paragraphe 1 du présent Article, l'Organisation garantit les Parties contractantes nationales contre l'action qui résulte d'un dommage survenu par suite ou à l'occasion des services fournis conformément aux dispositions du paragraphe 1 de l'Article 1 et du paragraphe 1 de l'Article 2 du présent Accord.

3. La responsabilité de l'Organisation peut être mise en cause, conformément au paragraphe 2 de l'Article 25 de la Convention amendée. Cependant, pour les cas visés au paragraphe 1 du présent Article, l'Organisation a un droit de recours contre les Parties contractantes nationales pour toute indemnisation due à ce titre.

4. [...]

<sup>17</sup> Francis Schubert, *The Liability of Air Navigation Services Providers: Some Lessons from the Single European Sky*, in *Achieving the single European sky: goals and challenges*, 59 (in Daniel Calleja Crespo and Pablo Mendes de Leon (eds), 51-64, Kluwer Law International, 2011)



apply<sup>18</sup>. Article 30.1 (b) further restricts the scope of the Treaty to damages caused by foreign ANSPs designated in accordance with Article 8 Regulation 550/2004.

With regard to applicable law and jurisdiction, it can be deduced from the wording of Article 30.5 that claims must be filed in the State of occurrence and must be decided according to national law. This follows the principle of international law that the courts of the place of occurrence have jurisdiction. But nothing precludes the possibility that the proper venue may be the home court of the victim, though the victim's home court might be reluctant to hear the case because of State immunity<sup>19</sup>.

The most problematic limitation in the Treaty, aside from the geographical scope, is that the Treaty is only a last resort remedy under article 30 paragraph 4. According to paragraph 4, the victims must first exhaust all the judicial remedies available and have a final judicial decision, before turning to the Treaty to get compensation for what has not yet been compensated under the definitive judicial decisions. In other words, if the State of occurrence does not directly compensate the victims, the victim will have to file a claim against the airline company, according to the Montreal Convention of 1999<sup>20</sup>.

Paragraph 4 may be understood differently, namely that the agreement will be applicable if no final decision is rendered. Nevertheless, there is one problem with this interpretation: when paragraph 4 is read in conjunction with the previous paragraph (paragraph 3), it is crystal clear that paragraphs 1 and 4 are only applicable after a final decision has been given, since the contracting party has two years to bring another claim. But, the wording of the FABEC treaty does not preclude the victims from directly filing a claim against the State or its ANSP. However, such a claim would fall outside of the scope of the FABEC agreement, as the scope of Article 30 is limited to damages that have not yet been compensated under a final judicial

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<sup>18</sup> Ibid, 60

<sup>19</sup> However, State immunity is unlikely to be much of a hindrance as much States renounce immunity. See: Lazar Vrbaski, *Liability of Air Navigation Service Providers: Towards an International Solution* 38 Air & Space law 33, 36 (2013)

<sup>20</sup> Francis Schubert, *The Liability of Air Navigation Services Providers: Some Lessons from the Single European Sky*, in *Achieving the single European sky: goals and challenges*, 59 (in Daniel Calleja Crespo and Pablo Mendes de Leon (eds), 51-64, Kluwer Law International, 2011)

decision<sup>21</sup>. Furthermore, third parties cannot rely on the FABs' agreements as they are agreements between States and therefore will not give rights to victims<sup>22</sup>.

Although, the protection offered by the agreement might seem extensive, closer examination of the provisions indicates that the Treaty is a last resort instrument and provides few answers beyond the basic one namely, that the State of occurrence is liable. This answer could already have been given by looking into International Conventions and national laws. Moreover, many cases are excluded from the scope of the Treaty, for instance if the ANSP is national one or if the accident occurred outside the FAB's boundaries. Additionally, the Treaty only applied when the foreign ANSP was designated according to the provision of Article 8 Regulation 550/2004. But, it should not be overlooked that the Treaty provides a major advantage: a legal mechanism for a State obligated to compensate for the negligence of someone else. For example, Article 30(6) of the Treaty enables such States to seek recourse against a foreign ANSP, or, if the foreign ANSP defaults, the territorial State may sue the State to which the ANSP is linked. And an adequate coverage of the ANSP is required, Article 30.11.

#### b. The South West FAB example.

The South West FAB encompasses Spain and Portugal. Even though Article 27 is one of the shortest provisions of the FAB Treaties, it is also clear, precise and concise. It leaves some room for the contracting States but at the same time makes it easily understandable for the involved parties, for the following reasons:

First, the scope of the agreement is clear: Chapter 15 is only concerned with civil liability. Chapter 15 is constituted of only one rather short article, namely Article 27.

Second, Article 27 paragraph 1 stipulates that 'A Contracting State shall be liable for the damage caused by its negligence or that of its agents or of any other person acting on its behalf, under the provisions of this Agreement'. This clearly declares the State is liable. But, paragraph 2 includes a safeguard allowing a State to bring an action against another State for

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<sup>21</sup> Ibid, 59

<sup>22</sup> In some of the ANSP agreements, it is stipulated that the agreement does not serve as a legal basis for third parties' claims. For example article 7.2.2 of the ANSP agreement for the NEFAB

reimbursement when the negligence of the other State or any agent acting on its behalf was in fact the proximate cause of the accident<sup>23</sup>.

Finally, the third paragraph refers to the choice of law and stipulates that the applicable law is the law of the place where the damage occurred, unless there is an arrangement stating the contrary. Contrary to Article 30.5 of the FABEC, this article is straightforward and concise, leaving no room for doubt. Unfortunately, the provisions still fail to address the question of proper jurisdiction.

### c. The UK-Ireland FAB

This is one of the two currently functioning FABs; however, the text of the State agreement is not available. The only accessible document is the Memorandum of Understanding. In this rather short document liability questions are not mentioned, which is not surprising. What is, however, obvious is that the main legal document leaves the contracting States a lot of freedom. Paragraph 5 of the Memorandum enumerates the reserved matters. From that list it can be deduced that the arrangement is influenced by the Chicago Convention<sup>24</sup>.

Point 6 is dedicated to dispute resolution. It is stated that a dispute will be resolved by the National Supervisory Authorities through mutual agreements or if the dispute is too complex by the FSC. Nevertheless, it is not stipulated which law will apply, which is the applicable forum and whether the agreement is a last resort instrument or not. Additionally, there are no provisions regarding to what extent the Chicago Convention is to be applied<sup>25</sup>. The liability system of these countries is not too different, therefore the question of liability would be less troublesome than in other FAB<sup>26</sup>.

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<sup>23</sup>Agreement on the establishment of the South West Functional Airspace Block (SW FAB) between the Republic of Portugal and the Kingdom of Spain (v42, 19 June 2012)

<sup>24</sup> Memorandum of Understanding in relation to the establishment of the Functional Airspace Block between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (25 January 2012)

<sup>25</sup> National Supervisory Authority Memorandum of Understanding between the UK civil aviation authority and the safety regulation division of the Irish aviation authority (January 2012)

<sup>26</sup> Courts Service Ireland, *History of the Law: 1691 – present*  
<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/8B9125171CFBA78080256DE5004011F8?opendocument> (accessed 29 June 2014)

#### d. The Danish- Swedish FAB

This agreement is rather short with only 21 articles but no specific article dedicated to liability<sup>27</sup>. Article 14, investigation of accidents and incidents, does not provide any help but only states that accidents or incidents are to be investigated by the Accident Investigation Committee. Article 20 only refers to dispute resolution and the obligation of the contracting States to negotiate in order to resolve the dispute.

It is worth mentioning that Sweden has entered into an agreement with Finland and a part of the Finish airspace has been delegated to the control of a Swedish ANSP<sup>28</sup>. Furthermore, a political declaration was signed in 2013, with a primarily purpose of enhancing cooperation between the two FABs (NEFAB and Danish-Swedish FAB). Future consolidation of the cooperation is not excluded, but rather the contrary<sup>29</sup>. However, here again there is no article dealing with liability issues but only a political agreement to create the so-called ‘Free Route Airspace’.

In the agreement between the ANSP, there is an article on liability and surprisingly enough the choice of court and law point toward Belgium<sup>30</sup>. But the agreement limits the right of recourse to the parties of the agreement<sup>31</sup>. It is clearly stated in the same article that each party is responsible for its own actions. But Eurocontrol can only be held responsible in the case of gross negligence or willful misconduct<sup>32</sup>. To be liable, the ANSP must have committed gross negligence or willful misconduct<sup>33</sup>.

The main difference between the Treaty establishing the FAB and the agreement between the ANSPs is that the latest is contractual in nature while the former is treaty binding states.

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<sup>27</sup> European Commission mobility and transport, *FAB DK-SE consultation process* [http://ec.europa.eu/transport/modes/air/single\\_european\\_sky/fab/fab-dk-se\\_en.htm](http://ec.europa.eu/transport/modes/air/single_european_sky/fab/fab-dk-se_en.htm) (accessed on 29 June 2014);

Agreement between the government of the Kingdom of Sweden and the government of the Kingdom of Denmark regarding the establishment of a Danish-Swedish Functional Airspace Block (17 December 2009)

<sup>28</sup>Risto Murto, *Annual Report on the Application of FUA chapter 15*, 5, LSSIP Year 2011 Finland <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/reports/2012-fua2011-fi.pdf> (accessed 3 July 2014)

<sup>29</sup> Nefab, *Declaration of commitment for cooperation in airspace development between the Governments of Denmark, Estonia, Finland, Latvia, Norway and Sweden* <http://www.nefab.eu/749/> (accessed 3 July 2014)

<sup>30</sup> Article 6-3 of the agreement

<sup>31</sup> Article 5-2(2) of the agreement

<sup>32</sup> Article 5-2(1)

<sup>33</sup> Article 5-2 (4). Furthermore, the lost of profit is not taken into account, Article 5-2(5)

e. BLUE MED FAB

The BLUE MED FAB groups Cyprus, Greece, Italy and Malta in a same block, and contains a specific liability provision. Article 25 is fairly identical to Article 30 of the FABEC agreement. Direct action against ANSP or its staff is prohibited, Article 25.2. This agreement can only be used as a last resort remedy after all international remedies have been exhausted, Article 25.3 in conjunction with 25.4. Any claim has to be filed in the State of occurrence, Article 25.5. The ANSP is under an obligation to reimburse the State, paragraph 6, but the State of occurrence and the State of the ANSP can agree on sharing the costs, paragraph 9. Furthermore, the State of occurrence or the ANSP has a right of recourse against any other person or entity, Article 25.10. An adequate coverage of the ANSP is required, Article 25.12. Finally, the Blue Med treaty supersedes the liability provisions in existing bilateral agreements between two contracting States, Article 25.14. Consequently, a large room of manoeuvre is left to the Member States.

f. Baltic FAB

The agreement between Poland and Lithuania leaves a lot of room for the Member States involved in the FAB. Chapter 9 is dedicated to liability issues. If one looks at it closely, it is possible to realise that the wording of this article is comparable to the one in the Treaty establishing the FABEC. Here again, the liability under this agreement can only be used as a last resort remedy (for the same reasons as for the FABEC), after all the international remedies have been exhausted.

Nonetheless, there are some major differences between the two FAB's liability provisions. First, Article 30.13 of the FABEC states that the Treaty supersedes other bilateral agreements which is not provided in the Baltic agreement. Secondly, Article 30.7 of the FABEC provides that in case of problem of reimbursement by the ANSP, then the States are entitled to refer the case to arbitration under the "Permanent Court of Arbitration optional rules for arbitrating disputes between two States". This provision is unique, as mostly reference to the Permanent Court of Arbitration is made with regard to any disputes arising out of interpretation or application of the Treaties which were not resolved by the respective FAB Council. For instance, Article 29.3 which has its equivalence in Article 32.2 of the FABEC Treaty. Thirdly, in paragraph 5 of the Baltic, it has been added that in instance where an ANSP is defaulting, then the parent Member State will have to compensate for the damages that occurred due to the

negligence of the ANSP. Last but not least, paragraph 7 provides for the possibility for the State or ANS may sue any natural or legal person. This right cannot be found elsewhere in the other agreements governing the creation of any of the FABs.

The agreement establishing the FAB must yet be supplemented by different agreements. In respect of ANSP, chapter 3, especially Articles 13, 18 and *seq.*, clearly mention that the contracting States must enter into legal agreements with the ANSP. Hopefully, these agreements will cover any possible claim related to liability of the parties.

The agreement still relies heavily on the Chicago Convention, above all with respect to investigating<sup>34</sup>. Although, this Treaty must be read in conjunction with the Chicago Convention, in many instances it leaves a lot of room for national legislators and still has to be supplemented by other agreements. When it comes to liability issues one may say that it is a rather complete instrument, at first sight. Concretely, although Article 27 governs liability in general, and also choice of law and forum in addition to giving the actors involved the possibility of claiming damages from any wrongdoer, legal or natural, it is still a last resort remedy only.

#### g. FAB CE

This block includes the largest number of States, namely, Austria, Bosnia & Herzegovina, Croatia, Czech Republic, Hungary, Slovak republic and Slovenia. This agreement does not have any specific article addressing liability. Article 22 relates to dispute resolution and refers to disputes arising with regard to ‘interpretation, application and performance of this agreement’, which is such a broad terminology that it could encompass a dispute for liability<sup>35</sup>. However, nothing in the document helps us understand the scope of that specific article and therefore we can only extrapolate on what is or is not included. Every FABs Treaties have a similar article in addition to a specific provision on liable for some of them. Consequently, Article 22 is of no help. This mechanism is only available for dispute between States, as provided by paragraph 1, and requires them to negotiate. If no solution can be reached, the dispute has to be settled by the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes.

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<sup>34</sup> See article 28 of the Treaty establishing the Baltic Functional Airspace Block

<sup>35</sup> Agreement on the establishment of Functional Airspace Block Central Europe (5 May 2011)

In the ANSP agreement, the effective provider is regarded as responsible. The pre-existing responsibility toward third parties is neither extensive nor limited, Article 13(1). According to Article 13 the ground for liability is negligence.

#### h. Danube FAB

Likewise, there are no provisions on liability in the agreement between Romania and Bulgaria. The only hit is that in case of disputes the ANSP board may require the SAPSC to deliver an expert opinion, Article 27.2<sup>36</sup>. Article 3 stipulates that the agreement does not restrict the freedom of the ANSPs to co-operate with other parties in order to achieve the goals of the Danube FAB. Article 4 lists the domains of cooperation, however there is no explicit mention of liability questions. One may presume that it will be dealt in point h, which refers to accident and incident investigation.

#### i. North European FAB (NEFAB)

The NEFAB encompasses Estonia, Finland, Latvia and Norway. The NEFAB agreement is unique in the sense that an explanatory note accompanies the legal text, which makes it easier for the reader to understand the drafters' intent.

According to the explanatory note that is provided in the agreement; 'An obligation imposed upon a State to compensate damages caused to passengers, aircraft operators or third parties on the surface, as a consequence of acts or omissions by an ANSP, only exists to the extent such an obligation is explicitly foreseen by an international convention or by the applicable national legislation of that State. This is the case both for strict liability as well as liability in case of negligence'<sup>37</sup>. Here, the legislators explicitly includes both strict and fault liability. One must pay attention to the fact that this agreement does not, in any case, create prerogatives for individuals or rights.

Furthermore, it imposes no duty on the States to repair damages caused by air navigation service providers. This can be deduced from the sentence; '[...]obligation is explicitly foreseen by an

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<sup>36</sup> DANUBE Functional Airspace Block ANSP cooperation agreement between Bulgarian Air Traffic Service Authority and Romanian Air Traffic Service Administration

<sup>37</sup> Agreement on the establishment of the North European Functional Airspace Block between the Republic of Estonia, the Republic of Finland, the Republic of Latvia and the Kingdom of Norway (version 1.0 with explanatory note, 6 July 2012)

international convention or by the applicable national legislation of that State'. At present, there are no international instruments specifically dedicated to State liability with regard to air navigation services. Nevertheless, the aim of Article 27 of the agreement establishing the NEFAB is to provide a legal framework that will allow all parties involved to know the extent of their responsibilities and duties but also to diminish the possibility that States rely on their sovereign immunity to avoid liability. Through this clear legal structure, the legislators intended also to provide legal certainty by designating the appropriate forum and law. The fact that the Treaty does not impose a duty on the States to repair damages caused by the ANSPs partially comes from the Chicago Convention which suggests, but does not require the signatory States to provide ANSP. As a result, since there is no strict obligation under customary international law, the State is only liable when it breaches or omits to fulfill one of its duties stated in an international convention.

Paragraph 1 of Article 27 makes it clear that a State can only claim damage to another State if it is based on negligence, excluding strict liability. According to paragraph 2, the ANSP can be held liable but no direct claim may be filed against it, whereas paragraph 3 refers to the right of the State to seek reimbursement from the ANSP. Paragraph 4 adds a twist; if the accident occurred due to negligence by both national ANS and ANSP then the cost will have to be proportionally divided between the two parties. Here again a paragraph is dedicated to the choice of forum and applicable law question; as stipulated in paragraph 5, it will be the law of the State where damages occurred.

The provisions governing liability issues for NEFAB are straightforward and do not require further agreements. However, NEFAB includes nothing with respect to the relationship between this agreement and international conventions except in the explanatory note. This point will probably have to be clarified.

Finally, there is at least one sub-agreement between two States that is an integral part of the NEFAB agreement. This agreement is between Norway and Finland. The main purpose of the agreement is to set a legal framework for the supervision of cross-border ATS provision<sup>38</sup>.

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<sup>38</sup> Risto Murto, *Annual Report on the Application of FUA chapter 15*, 5, LSSIP Year 2011 Finland <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/reports/2012-fua2011-fi.pdf> (accessed 3 July 2014)



The ANSPs agreement clearly states that it does not establish a legal basis for any claim by third parties, Article 7.2.2. Each party is responsible for its own actions, meaning that each party is liable for any loss, damages or injury to third parties resulting from the execution of its assigned tasks and any claim regarding Intellectual Property Right, Article 7.2.2 (2). The ground to hold the ANSP liable is gross negligence or willful misconduct<sup>39</sup>. Any loss of profit is to be compensated by the defaulting party<sup>40</sup>.

#### b. Comparing the agreements

After having looked in detail at each of the inter-state agreements, the next step is to compare them. Even though the ground for comparison is how liability is treated by each FAB, as we will see, this is not an easy task due to the various approaches Member States took with regard to that specific topic. However, we will work toward the best solution to solve the problem.

Some of the agreements adopt the same wording. For instance the agreement establishing the FABEC, BLUE MED and the Baltic FAB are nearly a direct copy-paste of each other. These three agreements are the most detailed and yet at the end, it is clear that the State of occurrence is liable, which could be established simply by looking at international law. It is not however until the fifth or sixth paragraph of the FABEC, BLUE MED and Baltic FAB agreements that this is stated, which may lead to confusion. Furthermore, it is clear from the provisions that each agreement is only a last resort instrument. A reading of these agreements suggests that while liability provisions were included, the Member States did not really want to deal with the problem in depth and therefore took the easiest solution, namely the creation of an article based on a broad International Convention containing many exceptions. The provisions on the question of jurisdiction or choice of law are not clear; they state ‘Claims for compensation as provided for in Article 30.1 shall be filed with the Contracting State concerned’, in other words, the State of occurrence. But since the three agreements are last resort instruments, no guideline is given as to the competent court or law applicable to the case at first. This makes it even more complicated to find a solution in a given case.

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<sup>39</sup> Article 7.2.1 (3)

<sup>40</sup> Article 7.2.1 (2)

Looking at the NEFAB agreement, one might be surprised by the first paragraph of article 27; indeed, the agreement explicitly states that a Member State can sue another State for costs incurred by the first State as a result of the negligence of the second State. The same holds true for the South West FAB, Article 27 paragraph 2. Although, one may assume that this is also the case for the other FABs, it is only an assumption.

Few arrangements explicitly refer to the choice of law and jurisdiction questions, namely the NEFAB, FABEC, BLUE MED and Baltic agreements. In the South West FAB agreement, the provision only deals with the choice of law issue but not jurisdiction. The Baltic arrangement is also unique in that it contains the possibility for the State or ANS to sue any natural or legal person arrangement, Article 27 paragraph 7. This right cannot be found elsewhere in the agreements governing the other FABs.

Notably, none of the agreements helps to solve the question of what will happen in the case of a cross-border collision above two FABs. Let us take the example of an aircraft flying from Florence to Brussels, which, just as it leaves the Italian airspace and enters the Swiss airspace, due to a gap in information between Italy and Switzerland, crashes over Switzerland. Can Switzerland claim damages from Italy? The agreements provide no assistance, therefore the solution will have to be given by either national or international law. The situation is different between Sweden and Finland, which are in different FABs, whereby a Swedish ANSP delivers service over a part of Finish airspace and liability is dealt with. Additionally, there is an agreement between these two states<sup>41</sup>.

What is even more striking from this comparison is that some FABs' Treaties, namely FAB Central Europe and Danube FAB, have no provisions on liability. The question is left to be answered by national laws. But, examination of the agreements that include liability provisions suggests that ultimately, the answer will likewise also be given by national and international law. Yet, the fact of having a provision creates legal certainty. One point is clear in all the agreements, the State of occurrence will be primarily liable and has jurisdiction, which is similar to Article 20 of the Rome Convention but much more restricted than Article 33 of the Montreal Convention.

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<sup>41</sup> Risto Murto, *Annual Report on the Application of FUA chapter 15*, 5, LSSIP Year 2011 Finland <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/reports/2012-fua2011-fi.pdf> (accessed 3 July 2014)

It is mostly a matter of taste and expectations, but in my opinion, the NEFAB and South-WEST Europe FABs are the most complete and straightforward agreements.

The Commission has maybe made a mistake by requiring close cooperation within a FAB without requiring the States to include a provision on liability containing similar information, leading to individualistic behaviour of each FAB<sup>42</sup>.

The ANSP agreements are impossible to compare as most of them are not available. But here again the most detailed and straightforward is the agreement covering the NEFAB ANSPs. The Baltic agreement for ANSPs is also clear. What is certain is that these agreements do not give rights to third parties and the FABs' Treaties are of great legal value.

The agreements can be ranked from good (i.e containing a liability provision) to bad (i.e no liability provision). The good Treaties are: the FABEC, the South-West FAB, the BLUE MED FAB, Baltic FAB and finally the NEFAB. The bad Treaties are: the Danish-Swedish FAB, the UK-Ireland FAB, the FABCE and the Danube FAB. A sub-categorization is possible among the good Treaties. From helpful or perfect to useless. The only really helpful instrument is the NEFAB, then comes the South-West FAB that is missing a provision on proper jurisdiction. On the other side of the spectrum, we find the FABEC, BLUE MED and the Baltic FAB. These Treaties contain a large range of provisions but at the end of the day, they are last resort remedies, meaning that International Conventions apply first. Therefore, they can be viewed as useless.

## Recommendations

The concept behind the SES is amazing and can bring the necessary changes the European airspace craves, at least economically. But legally speaking, at least with regard to the liability question, no real change will occur. Quite the contrary, an additional layer of fragmentation may result. As it now stands, the European legal framework designed for the SES does not provide for any form of liability. Therefore, the resolution of a case will rely on national law and international conventions. Even if the Commission thought about the issue but leave room

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<sup>42</sup> Christopher Lawless, *Bounding the vision of a Single European Sky* 180 *The Geographical Journal* 76, 78 (2014)

for the States to decide the matter, it will not change the fact that it will lead to divergent approaches to liability within Europe.

The system and delineation imagined by the Commission might not be the most apt to adequately and entirely address the problem of inefficiency. Indeed, the highest density region of Europe has been divided into four different FABs<sup>43</sup>. Even Eurocontrol stated that it was unlikely that the division as it stands would be ‘operationally optimal.’<sup>44</sup> But beyond this problem of division, another major problem is that the Regulations leave considerable room for Member States to maneuver<sup>45</sup>, which can lead to disparities within Europe. When reading the first regulations it seems that the Union tried to push an idea forward without thinking through the details and side effects of such legislation.

It is true that before 2004 and with nationally-based ANSPs, the question of liability was of less relevance and if the Union would have imposed a liability regime most probably the SES would never have come into existence. However, the approach it took is very problematic now: these inter-states agreements are a means to implement European law, but European law does not include precise provisions on liability and leave room for the State to manoeuvre nearly giving them carte blanche. Therefore, one may wonder about the status of these agreements. If they are to be considered laws, it means that a judgment of the CJEU will only be applicable to a specific FAB. Leaving aside the question of whether non-EU states will agree to be bound by CJEU decisions. That will lead to disastrous consequences; instead of having one Union we will have nine little areas with different sets of rules and different liability.

If the Union had taken the approach that the ANSP was liable and then could sue the negligent state afterwards, using a similar approach as the one establishing Eurocontrol, fewer problems would have occurred. The main advantage of this approach is that the current legislation would need fewer revisions than what is currently needed to make the system imagined in the SES operational. The state of occurrence will no longer bear the liability for an accident. As a result,

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<sup>43</sup> Indeed, Austria, Belgium, France, Germany, Italy, Luxembourg, The Netherlands, Switzerland and the UK are not in the same FAB.

<sup>44</sup>Eurocontrol, *Evaluation of Functional Airspace Block (FAB) initiatives and their contribution to performance Improvement*, 167 (Performance Review Commission) FAB Evaluation (2008)

[http://ec.europa.eu/transport/modes/air/studies/doc/traffic\\_management/evaluation\\_of\\_fabs\\_final\\_report.pdf](http://ec.europa.eu/transport/modes/air/studies/doc/traffic_management/evaluation_of_fabs_final_report.pdf) (accessed 3 July 2014); Christopher Lawless, *Bounding the vision of a Single European Sky* 180 *The Geographical Journal* 76, 78 (2014)

<sup>45</sup>Mark Franklin, *Sovereignty and Functional Airspace Blocks* 32 *Air & Space law* 425, 425 (2007)

the taxpayer of the state of occurrence would therefore not have to pay for an accident that occurred without any fault by his or her home state. Furthermore, this approach seems more fair as the ANSP will be directly liable for its own mistakes. Of course, in most cases, the home state of the ANSP will primarily pay and thereafter seek reimbursement from the ANSP. Additionally, Article 14 of the draft model State Level FAB agreement proposed by Eurocontrol is based on that concept. The SES allows a Member State to directly designate a foreign ANSP; therefore, changing the theory of liability would not contradict the legal text of the SES. Additionally, this approach had the advantage of being an intermediary one, meaning that on the one hand the Union has harmonized the legislation a bit more and on the other hand, the States still have some room of manoeuvre left.

But, this theory has also some defects; the ANSP could be sued and judged under laws different from its own, as the inhabitants of the State of occurrence might suffer damages and want to sue the ANSP in their own courts. Additionally, if a Member State designates a foreign ANSP, then the governing law for liability matters will be the law of the State designating the ANSP. This is also true for the model FAB agreement, in which choice of jurisdiction and law is clearly expressed, namely, the one of the state where the damages occurred. Furthermore, that model agreement allows the State of occurrence to sue the ANSP to recover any compensation incurred by the State resulting from damages caused by the negligence of the ANSP.<sup>46</sup> One could argue, however that these risks are inherent to the provision of services in a different state, and therefore, the ANSP should be ready to bear such responsibilities. This might lead to problems, for instance with regard to the insurance coverage. Therefore it is of great importance that the Inter-government agreements encompass this issue.

The main disadvantage of the ANSP primarily liable theory is to determine where the claims could be filed: the place where the damage occurred, the place where the damage is felt or the place of business of the defendant. There is a gap in European law as Rome II is not applicable. No restrictions in Brussels I exist as to its applicability to collisions. The place where the damages are felt would be the most difficult and would allow for claims to be spread across Europe. With regard to the two other solutions they both have pros and cons. The place where the damage occurred would lead to a case similar to the *Überlingen*, German courts applying German law but the defendant here would be the Swiss ANSP. The place where the defendant

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<sup>46</sup> Article 14.3 of the model FAB agreement

has its place of business would be simpler for the defendant and the ANSP would know in advance the risks it faces. But for the claimant it would be very burdensome.

Member States could look at the good FAB treaties in an attempt to draft similar instruments. Furthermore, FAB Treaties that have a useless article on liability could modify the instruments by taking the good Treaties as reference. It is imperative that choice of jurisdiction and choice of law are dealt with in the Treaties. The bad FAB Treaties could be redrafted by following the example of the good FABs' Treaties, such as NEFAB or South-West FAB.

Going further, the Member States could decide to streamline the cases to one jurisdiction. Eurocontrol as well as the governments of Denmark and Sweden have already subjected their claims to Belgian courts and law. Other Member States could imitate them. At least, we can hope for some consistency in the judgments. But this would be also problematic as the parties to the disputes would need to go to Belgium and hire lawyers there. If we streamline the cases, even for inter-FABs agreements, Belgian law will apply to the entire dispute. Therefore, it will avoid requiring stakeholders to take part in lengthy negotiations in order to reach an inter-FAB agreement. Except in the case of Finland and Sweden, this has not yet been done, meaning that when an accident occurs and actors of two different FABs are involved then only international law will be applicable. Lastly, it will be easier for the CJEU to render rulings applicable in Europe as a whole as they would be based on judgments from one court.

Another solution would be to subject all claims to arbitration. All the FAB Treaties refer to arbitration for matters concerning the interpretation of the Treaties themselves. It could be an option to extend the role of the Permanent Court of Arbitration to deal with these cases too.

But it is clear that there is a need for certainty. National law already provided the answer that the State of occurrence is primarily liable. But in this European context, other solutions could be reached. As it now stands, the SES framework does not change anything. However, due to the complexity of the system introduced, the resolution of a case will be much more complicated, with a level more of legislation added and the line between the actors involved becoming more blurred.<sup>47</sup> But, as long as the Union is convinced that the problem of allocation of liability should not be dealt with at European level, we can only propose remedies which will ease the resolution of a case but certainly not resolve the problem.

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<sup>47</sup>Francis Schubert, *The technical defragmentation of air navigation services* in *From lowlands to high skies: a multilevel jurisdictional approach towards air law: essays in honour of John Balfour*, 63 (in Pablo Mendes de Leon (ed), Martinus Nijhoff Publishers, 2013)

Another solution would have been for the Union to require the Member States to include in their agreements an article on liability and oblige them to include in the article provisions on choice of law, jurisdiction and whether or not the ANSP could be sued directly. This in turn would have made it easier in instance of an accident within a FAB as well as for the CJEU to render rulings applicable throughout Europe. One could argue that even with this provision that Member States have to include in their agreements articles about liability, choice of law and jurisdiction, the CJEU judgment would still not be applicable to all the other agreements as they could differ. If the provisions were to be the same, there would be no need for them in the agreements as the regulation would have already taken care of it. The Union to stipulate which points should be mandatory in all such treaties, which would help mitigate the enormous disparities that currently exist between the agreements. But, the idea of the Union dictating to Member States what to do will most certainly be rejected by Member States and viewed as a threat to their sovereignty. It is surely not desirable if the Union enters into more detailed regulation of secondary liability arrangements which may also be against the principles of freedom of agreements and subsidiarity. Nevertheless, it is desirable that the Union at least requires all States to include liability provisions and choice of forum rule in their agreements.

One thing is certain: there is room for improvement without requiring much effort. As the SES now stands it only blurs the picture more and adds a level of fragmentation. The Single European Sky is one of the greatest ideas of the Union. First, it will transpose the concept carried out by internal market to the sky, with some differences. It is a fact that the opening of the transport market should have been done earlier, which may have prevented Member States from being so protective over their airspace market. However, we can only change the future. With the current situation, the SES is the most suitable instrument to reduce delays and increase efficiency. The only flaw in the regulation is its lack of clarity with regard to liability. The position taken by the Commission is understandable but its overly lenient approach is leading to a different type of fragmentation within Europe, namely, a risk of bubble effect. Although it seems like a minor detail, it is imperative that some changes occur otherwise the first accident that happens will lead to catastrophically complicated cases and consequences for the taxpayers of the country in which the accident occurs.